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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

JIMMY MERCHANT and HERMAN SANTIAGO,

*Petitioners,*

—v.—

MORRIS LEVY, BIG SEVEN MUSIC CORP., ROULETTE RECORDS, INC., and WINDSWEPT PACIFIC ENTERTAINMENT CO.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Does the mandate of the Constitution that limits copyright protection to "authors" and the need to preserve the integrity of the records of the Copyright Office require that an action can be brought at any time during the existence of copyright protection to obtain a declaration of true authorship interests in a registered copyrighted work?

2. Is the state law remedy of an accounting that follows a declaration of joint authorship of a copyrighted work governed by state law principles of limitations rather than Section 507(b) of the Copyright Law which by its terms prescribes only infringement actions?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners, Jimmy Merchant and Herman Santiago, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit entered in this action August 7, 1996.

## OPINIONS BELOW

The opinions of the United States District Court for the Southern District of New York are reported at 828 F. Supp. 1048 (App 21a-50a), and at 848 F. Supp. 29 (App. 17a-20a). The opinion of the Court of Appeals for the Second Circuit, reversing and remanding with directions to dismiss the complaint, is reported at 92 F.3d 51 (App. 1a-14a).

## JURISDICTION

The judgment of the Court of Appeals sought to be reviewed (App.1a) was entered August 7, 1996. Jurisdiction is conferred on this court by 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 8 of the Constitution of the United States provides in pertinent part:

> The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive right to their respective Writings . . .

Chapter 5 of the Copyright Law entitled "Copyright Infringement and Remedies" provides in Section 507, 17 U.S.C. § 507(b), Limitations on Actions:

> (b) Civil Actions—No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

## STATEMENT OF THE CASE

On October 7, 1987, Petitioners, Jimmy Merchant and Herman Santiago, instituted this suit to obtain a declaration that they are the co-authors of the copyrighted musical work entitled WHY DO FOOLS FALL IN LOVE ("FOOLS") an attendant accounting of royalties and other relief. App. 6a. Jurisdiction was based upon the Declaratory Judgment Act, 28 U.S.C. § 2001, the existence of a federal question in the interpretation of joint authorship under the Copyright Law, 28 U.S.C. § 1331(a) and 17 U.S.C. § 101, and pendant jurisdiction 28 U.S.C. § 1338(a).

FOOLS was registered for copyright in the United States Copyright Office in 1956 by a purported co-author who falsely identified himself and Frankie Lymon ("Lymon") as the sole authors of FOOLS. App. 4a. Lymon was a true co-author. In 1984 FOOLS was duly registered in the Copyright Office for a 47 year renewal copyright in the name of Lymon and thereby was held in trust for all co-authors. The action was tried in part to a jury and in part to the court. App. 6a. The jury found Petitioners to be co-authors with Lymon and co-owners of the renewal copyright in FOOLS. App. 3a. The District Court declared Petitioners to be the owners of an undivided one-half interest in the copyright in FOOLS and awarded Petitioners those monetary damages that accrued within three years of the filing of the complaint in 1987. *Id.* The Court of Appeals reversed and remanded with instructions to dismiss the complaint by extending to declaratory judgments the statute of limitations in the Copyright Law applicable to copyright infringement claims. *Id.* In doing so, the Court of Appeals distinguished a claim of co-authorship from a claim of copyright infringement to change the previously uniform rule that the Copyright Law statute of limitations allows recovery for all wrongful acts that occur within three years prior to filing of the complaint. App.13a-14a.

The Court of Appeals well summarized the factual background essentially as follows.

Petitioners are two of the original members of the singing group "The Teenagers," which was formed in 1955. Petitioners jointly wrote the initial version of FOOLS in 1955. Lymon made a number of changes to FOOLS when he subsequently joined Petitioners' group. At the time Lymon was 12 years old and Petitioners each were 15. App. 3a.

In 1956, The Teenagers recorded FOOLS for Gee Records, then owned and operated by George Goldner, now deceased ("Goldner"). Petitioners relied on Goldner to handle the formalities of copyrighting FOOLS. Goldner informed Petitioners that only two authors could be listed on the copyright registration. Later in 1956, Goldner registered a claim to copyright in FOOLS in the Copyright Office, identifying himself and Lymon as sole co-authors. App. 4a.

Sometime in the 1950's, Lymon agreed to let Goldner exploit Lymon's interest in FOOLS. In 1964, defendant Morris Levy ("Levy") purchased Goldner's interest in several music companies, including the music publishing company that held the copyright in FOOLS. In a letter to the Copyright Office dated June 24, 1965, Goldner stated that Levy, rather than Goldner, had co-authored FOOLS with Lymon. The copyright registration was amended to reflect this statement and, thereafter, the copyright was held by Levy's company, Big Seven Music Corp. Although FOOLS became a hit and continues to be popular today, Petitioners never received any royalties from their co-authorship of FOOLS. App. 4a-5a.

Petitioners reached the age of majority in 1961. On several occasions in the 1960's Petitioners contacted Goldner, and then Levy, to inquire about royalty payments, but to no avail. The jury found that Goldner and Levy deliberately concealed from Petitioners the accrual of royalties. The jury also found that the only period during which Petitioners did not know, and could not have known with the exercise of reasonable

diligence, that royalties to which they were entitled had accrued, lasted from 1955 to 1961, while Petitioners were underage. Petitioners also testified that they were afraid of Levy and that this fear made them reluctant to press their claims. Petitioner Santiago testified that Levy threatened him in 1969, and Petitioner Merchant testified that Levy threatened to kill him when, in 1977, he inquired about royalties. Petitioners claimed that Levy was closely affiliated with organized crime and connected to a number of violent incidents. Levy was convicted in the late 1980's on federal extortion charges and sentenced to ten years in prison. The jury found that Levy threatened Petitioners with physical force and that Petitioners reasonably refrained from commencing suit because of the threats during a period that began in 1969 and lasted until December 24, 1984. App. 5a.

Beginning in the late 1970's, Petitioners took various steps in pursuit of their claim, including hiring an attorney and investigator to look into the status of the copyright in FOOLS. Petitioners did not take formal legal action until 1987, when they commenced this action. App. 5a-6a.

By agreement of the parties, the jury trial focused on the issues of authorship, fraudulent concealment, and duress. The parties also agreed that, based on the jury's findings, the District Court would make final rulings on ownership, statute of limitations, laches, equitable estoppel, and other unrelated issues. App. 6a. The District Court concluded that Petitioners' action "is one for a declaration of copyright ownership and the recovery of the royalties which accompany such ownership. The action is not properly framed as one for copyright infringement, . . . [Petitioners] clearly anticipated that the Levy defendants would exploit the copyright subject to an accounting for royalties." App. 31a. The District Court rejected the laches defense because the Levy defendants knew from the late 1950's the circumstances under which the copyright in FOOLS was registered and attempted, until Levy's death, either to conceal the facts or coerce Petitioners into

abandoning their rights. App. 45a. The District Court also rejected the defense of equitable estoppel because the jury found that Levy and Goldner knew of Petitioners' claim to ownership of the copyright in FOOLS and attempted to conceal the accrual of royalties from Petitioners, and Levy, in part, caused Petitioners' silence and inaction. App. 46a.

With respect to the statute of limitations, the District Court rejected Petitioners' claim set forth in the complaint for payment to petitioner of two thirds of the proceeds from FOOLS on an accounting attendant to the declaratory judgment, and determined that the three year statute of limitations of the Copyright Law applied to bar all recovery, except damages which accrued within three years of the commencement of the action. App. 49a. On a subsequent motion by Windswept Pacific Entertainment Co., the successor-in-interest to the Levy defendants, the District Court limited Windswept's liability to the three year period before it intervened in the action. App. 17a-20a.

The District Court entered judgment in favor of Petitioners declaring them to be the owners of an undivided one-half interest in the copyright in FOOLS, awarded Petitioners damages and interest in the sum of $355,439.72 against the Levy defendants and $216,297.33 against Windswept. App. 16a. All parties appealed and the Court of Appeals reversed the judgment stating, "We agree with Defendants' that [Petitioners'] claim seeking a declaration of co-ownership rights based on their co-authorship of Fools is time barred by the three-year statute of limitations" in the Copyright Law. App. 3a. The Court of Appeals reasoned that because a determination of joint authorship involves construction of the Copyright Law it confers federal subject matter jurisdiction over the entirety of the complaint. App. 12a. The Court of Appeals concluded that the Copyright Law statute of limitations applies to all civil actions under the Copyright Law, not just infringement claims. App. 12a-14a.

The Court of Appeals ruled that the statute barred both a declaration of co-ownership and all attendant remedies by computing the time period from the date of the acts constituting joint authorship counting forward from 1961, rather then counting three years backward from the date of filing the complaint with respect to defendants' continuing false claims. *Id.* In doing so, the Court of Appeals read into the statute of limitations a distinction in application to joint authorship and joint ownership claims that is totally contrary to the singular statutory language; and did not cite or discuss the opposite result recently reached by the Court of Appeals for the Fifth Circuit. The Court of Appeals also did not discuss, and apparently gave no consideration to the fact that by barring Petitioners' claims, a non-author is credited as an author of FOOLS, and a co-owner of the copyright therein, contrary to the mandate of the Constitution and the express provisions of the Copyright Law, or that the integrity of the Copyright Office records concerning FOOLS is materially impaired.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

Questions of joint authorship and ownership abound in all areas of copyright and have become even more prevalent with the application of copyright to computer programs and other new technological writings. The Court of Appeals herein held that the copyright infringement statute of limitations in § 507 of the Copyright Law foreclosed Petitioners' declaratory judgment action seeking correction of a copyright registration fraudulently obtained by a non-author. This decision frustrates the Constitutional mandate limiting copyright protection to authors, art 1, § 8, cl. 8, and is inconsistent with both the Copyright Law and the integrity of the public registry for copyrights.

The purpose of the declaratory judgment correcting false copyright entries should preempt application of any statute of

limitations. If it does not so preempt, the circuits are in conflict as to whether a state or federal statute of limitations should apply to co-ownership claims. The decisions of the Court of Appeals herein and the Ninth Circuit which applied the federal statute, as opposed to the Fifth Circuit which applied a state statute, invade areas of state control and destroy the federal-state balance expressly struck by Congress. This Court should resolve the conflict.

## POINT I

## THE USE OF THE LIMITATIONS ON INFRINGEMENT ACTIONS TO TIME BAR A DECLARATORY JUDGMENT OF TRUE COPYRIGHT AUTHORSHIP IS CONTRARY TO THE MANDATE OF THE CONSTITUTION AND THE EXPRESS PROVISIONS OF THE COPYRIGHT LAW, IMPAIRS THE EVIDENTIARY VALUE OF THE COPYRIGHT OFFICE RECORDS AND IS CONTRARY TO A CENTURY OF PRECEDENT

The Court of Appeals gave no consideration to the negative effect of its opinion resulting from closing the courtroom doors to a claim of true copyright authorship and ownership three years after the creation of a copyrighted work. As a result, by precluding the declaration in favor of Petitioners, the Court of Appeals has allowed a non-author to be vested with an authorship and ownership interest that is contrary to the Constitutional basis for copyright protection, the express limitations of numerous provisions of the Copyright Law that apply only to authors, the integrity of the official records of the Copyright Office and a century of uniform precedent.

**(a) The Constitution Limits Copyright Protection To Authors.**

Article I, Section 8, Clause 8 of the Constitution provides the Constitutional basis for copyright protection. It expressly restricts copyright protection to the writings of authors. "The Congress shall have Power . . . to promote the progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . " By cutting off the right to establish true authorship and ownership of a copyrighted work through a declaratory judgment action, the Court of Appeals has sanctioned copyright protection for a non-author, Levy, that is beyond the bounds of any copyright protection Congress could enact. 1 M&D Nimmer, *Nimmer On Copyright* § 1.06[A] at 1-44.40 (1995 Rel.) (" . . . under the Constitution, only an "author" is entitled to copyright protection . . ."); 1 Howard Abrams, *The Law of Copyright* § 102(A) at 1-7 (1996 Rel.) ("The Copyright-Patent Clause both prescribes and limits the method which Congress may use to encourage the production of 'Writings' by 'Authors.' The clause insists the grantees of the 'exclusive Right' of copyright must be 'Authors' . . . ").

**(b) Consistent With The Mandate of The Constitution, The Copyright Law Expressly Limits Copyright Protection To True Authors**

In conformity with the mandate of the Constitution, the Copyright Law expressly limits copyright protection in a work to its true authors. Thus, only an author is initially vested with the copyright in a copyrighted work 17 U.S.C. § 201(a); and only an author is entitled to a renewal and extension of the copyright in a copyrighted work, if the author is alive when the renewal copyright vests *Id.*, at § 304(a), (c).

In barring Petitioners' claims for a declaratory judgment, the Court of Appeals did not attempt to reconcile its sanction

of continued renewal copyright authorship and ownership by Levy, a non-author, and his assignees, with the Constitution or the Copyright Law.

### (c) There Is A Paramount Public Interest In Preserving The Integrity Of The Copyright Office Records That Fully Justifies An Unlimited Right To Obtain A Declaration Of True Authorship and Ownership of Copyrights

The United States Copyright Office is a public registry that should be as complete and accurate as possible. It provides copyright owners, copyright users and the public at large with permanent and official records of copyright claims. The certificate of copyright registration is prima facie evidence of the authorship, ownership and validity of a copyright. 17 U.S.C. § 410(c); *Gaste v. Kaiserman,* 863 F. 2d 1061 (2d Cir. 1988). Also, the document recorded in the Copyright Office concerning transfer of copyright interests "gives all persons constructive notice of the facts stated in the recorded document . . . " 17 U.S.C. § 205(c); App. 19a.

A true identification of copyright authorship has become of the highest significance because the 1976 revision of the Copyright Law measures the term of copyright protection by the life of the authors, with only a few inapposite exceptions. 17 U.S.C. § 302(a), (b). Therefore, precluding a declaration of true authorship necessarily alters the true measure of the term of copyright, impairs the ability of the public to obtain from the Copyright Office the true facts concerning the copyright in a falsely registered work and creates an interest in the copyright that is beyond the power of Congress to grant.

The Court of Appeals failed to give any consideration to the established law of its circuit and all other circuits, that "the knowing failure to advise the Copyright Office of facts which might have occasioned a rejection of the [copyright] application constitute[s] reason for holding the registration

invalid . . . " *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452, 456 (2d Cir. 1989), *citing and following Eckes v. Card Prices Update*, 736 F.2d 859 (2d Cir. 1984). In *Whimsicality*, the Court of Appeals "cautioned" applicants that in their submission to the Copyright Office "honesty is the best policy." *Id.* at 456 n.6. Neither *Whimsicality* nor *Eckes* discussed a time limitation on actions to establish or correct the Copyright Office records.

**(d) The Application of the Statute of Limitations to Bar The Declaration of True Authorship Is Contrary To A Century of Precedent**

We have found no case prior to 1996 that applied a statute of limitations to bar such an action for a declaratory judgment. Similarly, no court prior to 1996 had even suggested that the statute of limitations for infringement claims in the Copyright Law applies to a declaratory judgment action in a way that bars the right to establish true authorship and ownership under circumstances that would not bar an infringement claim. As discussed further in POINT II, *infra*, in 1996, the Court of Appeals for the Ninth Circuit created a conflict in the circuits and disregarded all precedent in concluding that the statute of limitations for infringement claims applies to claims for a declaration of joint authorship and ownership of copyright. *Zuill v. Shanahan*, 80 F.3d 1366 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3085 (U.S. July 10, 1996) (No. 96-119). That conclusion of the Ninth Circuit is in direct conflict with an opinion of the Fifth Circuit filed earlier the same month. *Goodman v. Lee*, 78 F.3d 1007 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 166 (1996) ("*Goodman 2*"). The Court of Appeals in this case cited and followed the Ninth Circuit without citing, discussing or apparently even considering *Goodman 2*.

The Copyright infringement statute of limitations was first enacted in 1957. 17 U.S.C. § 115, *as amended by* Act of Sept. 7, 1957 (current version at 17 U.S.C. § 507(b)). Prior to the

1957 enactment, all copyright infringement claims were governed by the state statutes of limitations applicable in the forum. *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338 (5th Cir. 1971). Despite the availability of state statutes of limitations, actions for a declaratory judgment of co-authorship and co-ownership of copyrights were not barred by such statutes. Rather, delay was treated as an evidentiary circumstance bearing upon the strength of the claimant's case. *E.g.*, *Jerry Vogel Music Co. v. Forster Music Publisher, Inc.*, 147 F.2d 614 (2d Cir.), *cert. denied*, 325 U.S. 880 (1945); *Edward B. Marks Music Corp. v. Wonnell*, 61 F.Supp. 722 (S.D.N.Y. 1945). Following the 1957 enactment of the copyright infringement statute of limitations, courts continued to treat co-authorship claims as limited only by equitable considerations arising from the peculiar facts of a case. *E.g.*, *Jackson v. Axton*, 25 F.3d 884 (9th Cir. 1994).

## POINT II

## THE APPLICATION OF THE COPYRIGHT INFRINGEMENT STATUTE OF LIMITATIONS TO DECLARATORY JUDGMENT ACTIONS HAS CREATED A DIRECT CONFLICT IN THE CIRCUITS AND AN UNWARRANTED BREAK WITH A CENTURY OF UNIFORM PRECEDENT

This Court has not considered the scope and operation of the copyright infringement statute of limitations since its initial enactment in 1957. Neither has this Court considered the proper law to govern an action for a declaratory judgment of copyright interests and attendant remedies. At all times prior to 1996, however, it appeared to be settled at the circuit level that such an action and attendant remedies were governed exclusively by state law. In *Oddo v. Ries*, 743 F.2d 630, 632-33 (9th Cir. 1984), the Court of Appeals stated the general

principles governing joint authorship and ownership rights and remedies as follows:

> A co-owner of a copyright cannot be liable to another co-owner for infringement of the copyright. *Richmond v. Wiener*, 353 F.2d 41, 46 (9th Cir. 1965); *Picture Music Inc. v. Bourne, Inc.*, 314 F.Supp. 640, 646 (S.D.N.Y. 1970), *aff'd* 457 F.2d 1213 (2d Cir.), *cert. denied* 409 U.S. 997, 93 S.Ct. 320, 34 L.Ed.2d 262 (1972). Rather, each co-owner has an independent right to use or license the use of the copyright. *E.g., Meredith v. Smith*, 145 F.2d 620, 621 (9th Cir. 1944); *Edward B. Marks Music Corp v. Jerry Vogel Music Co.*, 140 F.2d 266, 268 (2d Cir. 1944); *Piantadosi v. Loew's, Inc.*, 137 F.2d 534, 537 (9th Cir. 1943); *see generally* Comment, Problems in Co-ownership of Copyrights, 8 UCLA L.Rev. 1035, 1039-47 (1961). A co-owner of a copyright must account to other co-owners for any profits he earns from licensing or use of the copyright, *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir.), *modified*, 223 F.2d 252 (1955); *Picture Music, Inc.*, 314 F. Supp. at 646-47, but the duty to account does not derive from the copyright law's proscription of infringement. Rather, it comes from "equitable doctrines relating to unjust enrichment and general principles of law governing the rights of co-owners." *Harrington v. Mure*, 186 F.Supp. 655, 657-58 (S.D.N.Y. 1960) (footnote omitted).

In April, 1996, the Court of Appeals for the Ninth Circuit, citing *Oddo*, but not discussing its determination that state law principles govern an action among co-authors and co-owners of copyrights, applied the copyright infringement statute of limitations to a claim seeking a declaration of co-authorship with an attendant accounting, and held the claim to be time barred. *Zuill v. Shanahan*, 80 F.3d 1366 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3085 (U.S. July 10, 1996) (No. 96-119). The court refused to follow or dis-

tinguish a recent Second Circuit opinion that held the statute did not bar a claim of ownership. *Id.* at 1370, *citing Stone v. Williams,* 970 F.2d 1043 (2d Cir. 1992), *cert. denied,* 508 U.S. 906 (1993), as "not controlling authority in this circuit." The court concluded that the copyright infringement statute of limitations applies to such a claim because it is a civil action "maintained" under the Copyright Law. *Id.*, at 1371. The court did not discuss, and apparently was unaware of, the contrary ruling of the Court of Appeals for the Fifth Circuit filed days earlier in *Goodman 2, supra.* The Fifth Circuit concluded that the application of federal law in such an action is limited to a determination of the meaning of joint authorship, and that all other aspects of the claim, including the statute of limitations is governed by state law. As the Fifth Circuit explained in pertinent part, citing numerous uniform precedents, at 1012:

> The applicability of federal law ends with that determination, as Goodman's claim for an accounting is governed in all respects by state law. It is widely recognized that "[a] co-owner of a copyright must account to other co-owners for any profits he earns from the licensing or use of the copyright . . ." Significantly, "the duty to account does not derive from the copyright law's proscription of infringement. Rather, it comes from '. . . general principles of law governing the rights of co-owners.' " As those general principles are rooted in state law, we look to the law of Louisiana for answers to the remaining issues presented by this appeal. (footnotes omitted).

The Court of Appeals is this case cited only an earlier ruling in *Goodman,* on the threshold issue of federal jurisdiction, 815 F.2d 1030, (5th Cir. 1987), but never discussed or even cited the ruling in *Goodman 2.* It appears from the record herein that the arguments of the parties were focused principally on the issue of threshold federal jurisdiction and that the need for dual application of federal and state law was not pre-

sented. Instead the Court of Appeals herein cited and followed *Zuill* as if it were an undisputed authority. The Court of Appeals distinguished its earlier, contrary decision in *Stone*, 970 F.2d 1043, on the basis that the claim therein was not barred by the copyright infringement statute of limitations because it was based on "highly idiosyncratic facts." App. 13a.

The view of the Fifth Circuit clearly is the right one. As part of the 1976 revision of the Copyright Law the copyright infringement statute of limitations was placed in Chapter 5, which is limited to "Copyright Infringement and Remedies." 17 U.S.C. §§ 501-511. That placement expressed a clear Congressional intent to limit applications of the statute to infringement actions. Previously, when first enacted in 1957 as an amendment to the 1909 Copyright Law, it was placed in Chapter 2, which also was limited to "Infringement Proceedings." 17 U.S.C. §§ 101-116. The legislative history to the initial enactment reveals consideration of application of the statute to only infringement actions. *E.g.*, S. REP. NO. 1014, 85th Cong., 1st Sess., 34a-40a (1957), *reprinted in* 1957 U.S.C.C.A.N. 1961-66; H.R. REP. NO. 150, 85th Cong., 1st Sess., 1-5 (1957).

The balance struck by Congress in providing a statute of limitations for infringement actions only, and leaving issues of ownership to be governed by state law is not only consistent with a century of precedent, it is a reflective of a deliberate choice which Congress employed again in 1996 when it added a Chapter 11 to the Copyright Law. 17 U.S.C. § 1101, Pub L. No. 103-465, Title V, § 512, Dec. 8, 1994, 108 Stat. 4974. By that enactment, Congress chose to provide a federal claim for unauthorized recordings of a live musical performance that incorporates certain infringement remedies, but excludes the infringement statute of limitations and preserves all state law rights and remedies applicable to the unauthorized conduct. *Id.*, at (a), (d).

The Court of Appeals in this case and in *Zuill* failed to give due consideration to the limits of federal jurisdiction when it is based solely on a threshold issue, such as co-authorship. Although the threshold issue requires construction of the Copyright Law, the claim has no other basis in federal law. The failure of the Court of Appeals in this case to apply the appropriate state laws, even though not directly raised by Petitioners, is a mistake of law. The orderly administration of justice requires that this Court settle the dispute in the circuits resulting from the unprecedented decisions of the Second and Ninth Circuits. Their departure from century old precedent, contrary to the Constitutional mandate, the express provisions of the Copyright Law and the need for accuracy in the Copyright Office records, should not be allowed to continue. The inevitable result of their view is the sanction of false and fraudulent public records that benefit no one except wrongdoers such as the Levy defendants.

## CONCLUSION

For the foregoing reasons, Petitioners Jimmy Merchant and Herman Santiago, pray that this Court grant a Writ of Certiorari to review the opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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